Little Clicks, Big Consequences

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Brett Frischmann & Evan Selinger, **Re-Engineering Humanity** (2018).

The unique qualities of digital contracts—weightless, easily duplicable—have made them ubiquitous and much longer than their paper counterparts. Consequently, they are everywhere and accordingly, nobody reads them. Yet, courts have consistently argued that digital or "wrap" contracts (shrinkwrap, clickwrap, browsewrap, etc.) are just like paper contracts and that the same doctrinal rules should apply.[1] Sure, tech giants like Facebook and Google use wrap contracts to vacuum our data under the guise of consent, and companies have used them to impose onerous one-sided clauses, but isn't that just the same old "lack of consumer bargaining power in a capitalist society" problem that we've always had dressed up in digital form? It's not like digital contracts will lead to the end of civilization as we know it—or will they? In *Chapter 6* of their fascinating, original book, *Re-Engineering Humanity*, Brett Frischmannn and Evan Selinger argue that ubiquitous, digital contracts may have profound negative consequences for humanity.

It may seem an odd choice to select a non-contract specific book for a contracts section JOT, and even more so to focus specifically on a particular chapter in that book. Even though Re-Engineering Humanity is about more than contracts, it is also and importantly about contracts. Frischmann and Selinger argue that contracts are doing something much more sinister than implementing one-sided bargains and deleting our rights with a click. They argue that contracts are actually erasing our humanity and turning us into simple machines.

Their focus is on electronic contracting and how the "design of this environment might incline people to behave like simple stimulus-response machines" that become "increasingly predictable and programmable." (P. 60.) They note that contracting practices have changed to "accommodate changes in economic, social, and technological systems" so that instead of enhancing individual and group autonomy, contracts "implemented in electronic architecture" may actually be "oppressive." (P. 60.)

Frischmann and Selinger characterize the "contracting problem" in two ways: First, they argue that the "electronic contracting environment should be understood as a techno-social tool for engineering human beings to behave automatically, like simple machines." Their second characterization is a bit abstruse and requires a foray into Frederick Taylor's theory of scientific management (which they discuss in the preceding chapter). Basically, Taylor turned the late 19th century workplace into the more efficient and productive 20th century workplace. He did so by focusing on how workers could be better managed to be made more efficient, essentially viewing them as tools whose efficiency could and should be maximized. Often, this required workers to perform repetitive, discrete tasks without considering the dehumanizing effect that this might have on the worker, or how it might degrade the worker's skills, essentially treating the worker as a machine. (Pp. 53-59.) Frischmann and Selinger describe the problem of electronic contracting as "a system of scientific management that's directed toward consumers" in much the same way that laborers in Taylorist workplaces were conditioned to behave like efficiency machines. (P. 61.)

Contracts were intended to be tools to implement autonomy but in the electronic environment they have the opposite effect, "they condition us to devalue our own autonomy," (P. 61.) by making us act

like automatons, clicking and swiping as obediently as well-programmed robots. Their argument "is not about the goodness or badness of contract terms per se. Nor is it about the outcomes in specific contracts, transactions, or cases. Rather, our concern is with the social costs associated with rampant techno-social engineering that devalues and diminishes human autonomy and sociality." (P. 62.) In *Appendix E*, they engage with contract theory more directly, finding that "even if electronic contracting perfected markets by lowering transaction costs and improving efficiency, society might nonetheless be much worse off." (P. 316.) In their view, the real threat to society is not from the substantive terms in a given transaction, but from the design of digital contracts which is intended to make us humans act like "simple stimulus-response machines." (P. 78.)

Frischmann and Selinger present a compelling argument that digital contracts are actually erasing our humanity and turning us into simple machines. The ubiquity of contracts and their design mean that we are constantly clicking and swiping without thinking. Frischmann and Selinger offer a unique and very big picture perspective which should disabuse those who might think of contracts solely as tools of efficiency. They urge that the law of electronic contracting should be reformed because more is at stake than the (unread) terms and conditions—it is the concept of human autonomy itself. *Chapter 6* and *Appendix E* alone are worth the price of the book, but the other chapters of *Re-Engineering Humanity* are equally compelling. I urge you to put down your phone and give it a careful, non-tech distracted read.

1. Hubbert v. Dell Corp., 844 N.E. 2d 965, 968 (Ill. 2006); Scherillo v. Dun; Bradstreet, Inc., 683 F. Supp. 2d 313, 322 (E.D.N.Y. 2010).

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